# Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 6 • NUMBER 5 • NOVEMBER 2, 1993

## Offense Conduct

### DRUG QUANTITY—MANDATORY MINIMUMS

**Ninth Circuit holds that, for mandatory minimum sentences, conspiracy drug amounts should be determined under Guidelines' reasonable foreseeability analysis, regardless of amounts specified in the indictment.** Defendants were convicted of conspiracy to distribute cocaine and heroin. The conspiracy count specified that at least one kilogram of heroin and five kilograms of cocaine were involved in the conspiracy, and the sentencing court ruled that it was not free to determine whether defendants were responsible for smaller amounts for purposes of the statutory minimum under 21 U.S.C. § 841(b)(1)(A).

The appellate court held this was error and remanded for one defendant (the error was held harmless for the other defendant). The mandatory sentence under "§ 841(a) does not alter the court's responsibility to assess a defendant's 'individual . . . level of responsibility' for the amount of drugs involved in an offense by determining, in accord with the Guidelines, the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty."

"The sentencing court's responsibility to determine the quantity of drugs attributable to a defendant is not altered by the fact that the amount involved in a drug conspiracy is specified in the indictment. Quantity is not an element of a conspiracy offense. . . . The drug amount attributable to a defendant for purposes of sentencing is not established merely by looking to the amount of drugs involved in the conspiracy as a whole, '[u]nder the Guidelines each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.'. . . [I]t is not relevant for sentencing purposes whether or not an indictment specifies the amount alleged in the conspiracy."

*U.S. v. Castaneda*, No. 92-30077 (9th Cir. Oct. 5, 1993) (Nelson, J.).

See *Outline* at II.A.2 and 3 and summary of *Irvin* in 6 *GSU* #2.

### CALCULATING WEIGHT OF DRUGS—MIXTURES

*U.S. v. Palacios-Molina*, No. 92-2887 (5th Cir. Oct. 27, 1993) (Johnson, J.) (Remanded: Weight of liquid that cocaine was dissolved in for transport should not be included. "The cocaine in the present case was not a usable substance while it was mixed with the liquid in the bottles. Only after the liquid was distilled out would it be ready for either the wholesale or retail market. . . . Thus, as this liquid was not part of a marketable mixture, it is not implicated under the market-oriented analysis in *Chapman [v. U.S.*, 111 S. Ct. 1919 (1991)] and should not have been considered part of a mixture . . . under § 2D1.1. . . . For sentencing purposes, the method of transporting the drugs is unimportant. Rather, it is the amount of that commodity trafficked that counts.").

*U.S. v. Killion*, No. 92-3130 (10th Cir. Oct. 13, 1993) (Alley, Dist. J.) (Affirmed: Holding that *Chapman v. U.S.*, 111 S. Ct. 1919 (1991), did not change circuit precedent for determining weight of amphetamine precursor mixture: "we today again hold that so long as a mixture or substance contains a detectable amount of a controlled substance, its entire weight, including waste by-products of the drug manufacturing process, may be properly included in the calculation of a defendant's base offense level under § 2D1.1."). *Accord U.S. v. Innie*, No. 92-50239 (9th Cir. Oct. 5, 1993) (O'Scannlain, J.) (for methamphetamine).

See *Outline* at II.B.1, summaries of *Newsome* and *Nguyen* in 6 *GSU* #3, *Johnson* in 6 *GSU* #2, and list of amendments below.

### LOSS

*U.S. v. Lowder*, No. 92-6378 (10th Cir. Sept. 17, 1993) (Kelly, J.) (Affirmed: It was proper to include in the loss calculation the interest that could have been earned on fraudulently obtained funds where defendant had guaranteed investors a 12% rate of return. Section 2F1.1, comment. (n.7), states that loss does not include "interest the victim could have earned on such funds had the loss not occurred," which the appellate court interpreted "as disallowing 'opportunity cost' interest, or the time-value of money stolen from victims. Here, however, Defendant defrauded his victims by promising them a guaranteed interest rate of 12%. He induced their investment by essentially contracting for a specific rate of return. He also sent out account summaries, showing the interest accrued on their investment. This is analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss. *See U.S. v. Jones*, 933 F.2d 353 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers).").

See *Outline* at II.D.2.b.

## Departures

### CRIMINAL HISTORY

*U.S. v. Carr*, No. 92-3767 (6th Cir. Sept. 28, 1993) (Ryan, J.) (Remanded: Extent of upward departure for defendant whose criminal history category was VI should not have been calculated by using hypothetical category IX based on 20 criminal history points. Although this methodology was previously accepted, the Nov. 1992 amendment to § 4A1.3, p.s., "disapprove[d] of this method . . . . Thus, instead of hypothesizing a criminal history range more than VI, the Guidelines require a sentencing court to look to the other axis and consider available ranges from higher offense levels." Here, defendant's "offense level would have to be increased from 18 to 21" to receive the sentence imposed. If the district court resentences defendant to the same sentence using offense level 21, "it must demonstrate why it found the sentence imposed by each intervening level to be too lenient.").

See *Outline* at VI.A.4.

*U.S. v. Carrillo-Alvarez,* 3 F.3d 316 (9th Cir. 1993) (Remanded: Departure above criminal history category VI for defendant with 19 criminal history points was improper because his "criminal history is simply not serious enough to justify a departure." Under § 4A1.3, p.s., "a court should not depart unless the defendant's record is 'significantly more serious' than that of other defendants in the same criminal history category. . . . However, defendants in category VI are by definition the most intractable of all offenders. The record does not reflect that Carillo, among all those in that criminal history category, has a criminal record so serious, so egregious, that a departure is warranted. . . . The sheer number of a defendant's criminal history points is not, so to speak, the point. A sentencing court must look, rather, to the defen-dant's overall record. . . . We emphasize, as does the Sentencing Commission, that a departure from category VI is warranted only in the highly exceptional case.").
See *Outline* at VI.A and A.4.

### Aggravating Circumstances

*U.S. v. Schweitzer,* No. 92-5713 (3d Cir. Sept. 16, 1993) (Stapleton, J.) (Remanded: For defendant convicted of conspiring to bribe a public official to secure confidential information from the Social Security Administration, it was error for the district court to base an upward departure partly on defendant having given multiple media interviews "as well as telling about what he had done and, on the Oprah Winfrey Show, how much money he got out of it, and bragging or predicting that he would get probation." There were other factors that warranted departure, such as defendant's "corruption of a government function" and the "loss of public confidence," see § 2C1.1, comment. (n.5), but "it was inappropri-ate for the district court . . . to take into account Schweitzer's media efforts to call attention to the alleged ease of acquiring confidential information held by the government," "a situation that is unquestionably a matter of public concern.").
See *Outline* generally at VI.B.2.

## Determining the Sentence

### Fines

*U.S. v. Norman,* 3 F.3d 368 (11th Cir. 1993) (per curiam) (Remanded: "Section 5E1.2(i)'s plain language imposing costs of imprisonment and supervision as an additional fine amount supports the holding of the courts in *Labat, Corral,* and *Fair* that such additional fine may not be imposed unless a [punitive] fine pursuant to § 5E1.2(a) is also imposed."). *Contra U.S. v. Favorito,* No. 92-50465 (9th Cir. Sept. 28, 1993) (Brunetti, J.) (Affirmed: Adopting *U.S. v. Turner,* 998 F.2d 534, 538 (7th Cir. 1993) [6 *GSU* #2]: "The district court did not err in imposing a fine of costs of imprisonment without imposing a separate punitive fine.").
See *Outline* at V.E.2.

## Adjustments

### Abuse of Position of Trust

*U.S. v. Lamb,* No. 92-2846 (7th Cir. Aug. 27, 1993) (Coffey, J.) (Remanded: It was error to refuse to give § 3B1.3 adjustment for abuse of trust to defendant letter carrier who pled guilty to embezzlement of U.S. mail. "Based on the facts in the case before us, we conclude that a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust."). *See also* U.S.S.G. § 3B1.3, comment. (n.1) (Nov. 1993) ("because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail").
See *Outline* at III.B.8.

## Probation and Supervised Release

### Revocation of Probation for Drug Possession

*U.S. v. Alese,* No. 93-1198 (2d Cir. Sept. 28, 1993) (per curiam) (Remanded: "We think the most reasonable interpretation of [18 U.S.C.] § 3565(a) is that a person found to have committed a narcotics-related violation of probation is to be sentenced to a prison term that is at least one-third the length of the maximum prison term to which she could originally have been sentenced." Thus, defendant whose original guideline range was 2–8 months should be resentenced "to a prison term of not less than $2\frac{2}{3}$ months and not more than eight months.").
See *Outline* at VII.A.2 and summary of *Sosa* in 6 *GSU* #2.

### Rehearing En Banc Granted:

*U.S. v. Aguilar,* 994 F.2d 609 (9th Cir. 1993) [5 *GSU* #14].
See *Outline* at VI.C.1.e and h, 4.a.

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**Note to readers:** Because the next *Guideline Sentencing: An Outline of Appellate Case Law* will not be issued until February 1994, we include here a list of *Outline* sections that will be significantly affected by some of the Nov. 1993 Guide-lines amendments. This list is designed solely to alert readers to these changes, not to explain them, and does not include all of the new amendments.

Outline Section - Amendment

II.B.1 - The definition of "mixture or substance" in § 2D1.1, comment. (n.1), was revised. Also, a new method for determining the weight of LSD is set forth in § 2D1.1(c)(n.*) and comment. (n.18). Note that these amendments are retroactive under § 1B1.10, p.s.

II.B.3 - A new definition of "cocaine base" is provided in § 2D1.1(c)(n.*).

II.D.1 - § 2B1.1, comment. (n.2), now states that loss does not include interest that could have been earned on stolen funds.

II.E and III.B.6 - § 1B1.1, comment. (n.4), now directs that adjustments from different guideline sections are to be applied cumulatively, absent instruction to the contrary.

III.B.6 - § 3B1.1, comment. (n.2), was added to clarify that the aggravating role adjustment only applies to one who controls other participants, but that an upward departure may be warranted for one who controls only property, assets, or activities.

III.B.8.a - The definition of an abuse of position of trust in § 3B1.3, comment. (n.1), was reformulated.

IV.A.3 - § 4A1.2, comment. (n.6), was amended to clarify that the guideline and commentary are not meant to enlarge a defendant's right to collaterally attack a prior conviction.